NOTES

WASHINGTON NOTES

A Message on the Trust Question
The Corporation Inquiry
Future of the Tobacco Case
The Railroad Securities Report
A New View of the Inheritance Tax

President Taft has sent a message to Congress on the trust question (Executive Message, December 5, 1911) which is generally regarded as the most complete and judicial review of the corporation controversy up to date that has yet appeared. The discussion in the message follows substantially the general lines that have been adopted by the Executive in public speeches during the past few months, but it adds some new material and eliminates some of the less tenable positions that had been taken. The President is clear that the Sherman anti-Trust Law is a desirable statute and should be retained on the books unamended. In apparent contradiction to this view is the opinion that there is no reason why Congress should not pass a supplementary statute, defining and enumerating the acts which in its judgment are unfair and constitute restraints upon trade. President Taft also recommends the plan which he brought forward some two years ago in favor of federal incorporation of concerns doing an interstate business. A new suggestion for legislation is seen in the recommendation that there be created a federal commission to deal with the trust question and to receive reports from corporations and in a preliminary way to pass upon questions which may be submitted by such corporations with a request for advice or information on points that are not considered clear. The crucial part of the President's message is probably a passage in which he says: "I see no objection—and indeed I can see decided advantages—in the enactment of a law which shall describe and denounce methods of competition which are unfair and are badges of the unlawful purpose denounced in the anti-trust law. The attempt and purpose to suppress a competitor by underselling him at a price so unprofitable as to drive him out of business, or the making of exclusive contracts with customers, under which they are required to give up association with other manufacturers, and numerous kindred methods for stifling competition and

effecting monopoly should be described with sufficient accuracy in a criminal statute, on the one hand, to enable the government to shorten its task by prosecuting single misdemeanors instead of an entire conspiracy, and, on the other hand, to serve the purpose of pointing out more in detail to the business community what must be avoided." With such a piece of legislation, the functions of the bureau or commission to deal with corporation questions, of which the President speaks, would be extensive. He suggests that it should "be invested . . . . with the duty . . . . of aiding courts in the dissolution and re-creation of trusts within the law," while it would also devote much attention to the attainment of publicity and supervision of stock and bond issues. The plan would not be to permit any company to obtain exemption from oversight by this commission, or from prosecution under the anti-trust law, even if organized under a federal incorporation statute which would allow such a concern to get the apparent sanction of the government at the opening of its existence.

The President's message offers, as a kind of appendix, the most complete list of suits brought and prosecutions instituted by the United States under the Sherman anti-Trust Law. Some criticism has been provoked by the fact that this enumeration has been classified by administrations, apparently with the purpose of rendering possible a comparison of the present administration with its predecessors as respects activity against combinations. The enumeration gives a compact and convenient statement in authoritative form of the disposition made of each of these cases.

The Senate Committee on Interstate Commerce has nearly completed the series of hearings on the general question of the control of corporations and "trusts" which it was authorized, just at the close of the special session of last summer, to hold. The hearings have been numerous and extensive and have resulted in the presentation of views by a large number of men representing different groups in the community. The large financial interests, the business public, representatives of independent interests at war with various "trusts," university students of the corporation question, and various others have been heard. Almost unanimously the opinion has been expressed that the Sherman anti-Trust Law is out of date and needs revision. Practically the only serious exception to this view has come from a certain number of business men who regard the law as a bulwark or protection against monopoly. There has been less agreement on the remedies to be applied to the pres-

ent situation, but most of the witnesses have taken the view that a federal corporation similar to the Interstate Commerce Commission in size and importance should be established. Much less agreement has been indicated with reference to the functions of this commission, but the commonest view has been that it should pass upon various questions relating to the legality of corporate enterprises, with the privilege of an appeal to the courts in cases where its decisions are not acceptable. Some others have urged that the commission should be vested with the duty of applying a law providing for federal incorporation, but there has been no general agreement on the question whether such a federal incorporation law could be put into effect or not. There has also been difference of opinion whether, in case such a law should be adopted, it should be permissive or compulsory. Still less agreement has been found with reference to the question whether the government should in any way seek to fix the prices of commodities through the efforts of this commission or otherwise. The general attitude of the witnesses has been opposed to such action. Decided differences of opinion have been manifested regarding the advisability of adopting legislation intended to specify the acts and practices which should be deemed unfair, and which corporations should be prohibited from committing under penalty of losing their federal charters (in the event of the passage of an incorporation law), of of suffering prosecution under the Sherman anti-Trust Law, or both. The members of the committee are strongly divided in their views with reference to the action which should be taken. No official report has yet been made, but it is now planned to lay before the Senate a bill providing for a federal commission of some kind. Opinion is apparently against the incorporation plan, unless possibly in the permissive form. Further extension of government functions, as in connection with the fixing of prices, has comparatively little support. A number of radical ideas have been presented to the commission, prominent among which are those of establishing an absolute limitation upon the capitalization of corporations and prohibiting concerns from engaging in lines of business outside one specified class or group, to be mentioned in its charter with such as are directly ancillary thereto. Among the acts which it has been proposed to prohibit as unfair or restrictive of trade are the purchase and holding idle of patents, the making of contracts with others to refrain from doing business, etc. It is also desired to give independent interests larger rights of intervention in proceedings against monopolies under the Sherman Law. Several reports from the committee, indicating the views of various groups among the members, are expected.

In determining not to appeal to the Supreme Court of the United States from the decision of the Circuit Court of New York in the American Tobacco Company reorganization case, Attorney-General Wickersham has given a new turn to the discussion of the trust question and has subjected the Taft administration to a considerable amount of criticism. Subsequent to the decision of the lower court, in which it practically approved the plan of reorganization which had been proposed by the attorney for the American Tobacco Company, although it directed the addition of a few changes suggested by Attorney-General Wickersham, the announcement was unofficially made that there would be no appeal from this decision. An application on the part of the independent tobacco interests to the Supreme Court of the United States for a review of the decision of the lower court was refused by the former tribunal on December 11. These independent tobacco interests included a large number of dealers, growers, and such manufacturers of tobacco as had not been absorbed by the American Tobacco Company. When the question of reorganization was brought before the lower court, attorneys representing the independent interests were allowed to present argument and thus to "intervene" in the case, although the court refused to give them any definite standing as parties to the suit, on the allegation that there was nothing in the law that would warrant such action on its part. The Sherman Act made no provision for any intervention in a formal way. Consequently the appeal of the independents to the Supreme Court of the United States for the privilege of presenting argument was almost necessarily rejected by that court. This places the proceedings in the Tobacco case in a curiously unsatisfactory position, inasmuch as it will now always be contended that a full and complete test of the Tobacco reorganization was never had under the law, and that consequently the Sherman Act in its practical application to cases involving such reorganization has never been thoroughly threshed out. The cutting-off of the suit at this point, independent of the question whether or not the finding was deemed essentially satisfactory by government authorities, is therefore decidedly unfortunate. One result of the action of the administration in this regard has already been the making of representations to congressional committees by representatives of the independent interests who wanted to see power bestowed upon the independents. They have asked that a bill or resolution be passed requiring the administration to take an appeal to the tribunal of last resort, or that they be given the right to appeal. Pursuant to these requests, a bill has been introduced in the Senate (S. 5640) providing that all

rights which the United States had by way of appeal from the decision of the lower court shall be transferred to, and vested in, the independent interests concerned in the suit, in order that they may, if they wish, make use of these bestowed rights by taking an appeal direct to the Supreme Court. This brings up a question that is not likely to be settled positively for some time to come, but will recur at intervals throughout the session unless sooner passed. The failure to pass it shortly will, however, create vested rights in the defendants in the case (the American Tobacco Co. *et al.*) since they are proceeding on the strength of the findings of the lower court and are making their arrangements to correspond therewith. An amendment of the Sherman Act such as to give the independents intervention rights in future cases will, however, be a probable result of the discussion.

President Taft's Railroad Securities Commission has furnished him with a report on the methods deemed best for the control of securities issued by interstate carriers (Executive Message of December 11, 1911, transmitting the report of the Railroad Securities Commission). This commission, appointed in accordance with Section 16 of the Act of Congress of June 18, 1910, was organized in September, 1910, and consisted of President A. T. Hadley of Yale, and Messrs. F. N. Judson, W. L. Fisher, B. H. Meyer, and Frederick Strauss. It has held sessions during the time since its appointment, in Washington, New York, and Chicago. It now recommends to the President, and through him to Congress, the exactment of legislation providing for a physical valuation of railroads, and for full publicity through reports to the Interstate Commerce Commission, concerning the conditions and circumstances under which the issues of given securities are put out. The commission, besides making these recommendations, however, goes more or less elaborately into general problems relating to railroad issues. It points out the folly of requiring that property or money to an amount equal to stock issued shall be received by the issuer, since such receipt does not guarantee that the money is subsequently wisely used. Moreover, the commission shows that the amount of stock and bonds outstanding has no relationship to the earnings of roads or the rate which they are obliged to charge, or can or do charge, for freight moving over their lines, that being a complex problem to be dealt with on quite a different basis. The idea of attempting to limit railroad profits to a fixed percentage or to treat a high cash dividend as necessarily indicating extortion is of course regarded as both unfair and ridiculous. The commission, however,

believes that scrip, stock, and bond dividends should be prohibited on the ground that increased value in properties should be shown rather by a higher rate of dividend on the existing shares than by an addition to their nominal outstanding amount. In this same connection, the commission discusses the problem of intercorporate holdings and concludes that it is not wise to prohibit the ownership of the stock of one road by another, as that would involve too much disturbance of existing relations. However, the unnecessary extension of these holdings should be prevented and there should be provision for equitable dealing between representatives of the purchasing company on the one hand and the holders of minority interests on the other. It is suggested that any company or group of companies which has purchased a majority of the stock of any existing road may properly be required to buy the minority stock at the same price as that paid for the majority. If a company has acquired control of the common stock of another but not of its preferred stock, it should be required either to buy the preferred or to make the preference cumulative. The commission passes to a less secure line of reasoning when it advocates the issue of stock without any definite par value on the ground that in that case the danger of deceptive representations is diminished, although it does not recommend that legislation looking to the removal of the nominal par value from the face of shares of stock should be attempted. With reference to physical valuation it is recommended that the legislation, if any, to be adopted for that purpose should be simply permissive to the Interstate Commerce Commission which should be provided with funds for the purpose of valuation at its discretion.

Very important action has been taken by the Supreme Court of the United States in a brief decision handed down on December 4, 1911, in the case of *United States* v. *The Fidelity Trust Company*—an appeal from the Court of Claims (Supreme Court of the United States No. 280, October term, 1911). This case decides a question which has been in litigation for a good while—how far an inheritance consisting of an annuity or deferred claim is subject to inheritance taxation. Herein is involved the essential issue of the time at which an inheritance tax becomes payable, which can be determined only by deciding when an inheritance has actually been received under the law. Several decisions on closely allied points have been rendered by the court in the past, but the present finding seems to run counter to these and to take a new position. At present, by reason of the repeal of the federal inheritance tax

law under which this and other cases came up, the issue is academic so far as the present fiscal affairs of the United States itself are concerned. Yet the fact that an inheritance tax may again be applied by federal legislation in the future and that state courts are strongly guided in dealing with similar taxes within their jurisdiction by findings of the Supreme Court gives the subject a good deal more than purely abstract interest.

In the case in question an income was left to the inheritor, payable by trustees in quarterly payments during the period of the natural life. The value of the property thus left in trust was found to be about $120,000, and with the aid of mortuary tables on an assumed rate of interest of 4 per cent the collector of internal revenue sought to impose taxation upon a capitalized sum of $74,678. This was contested on the ground that the inheritance was received only as the sums were actually paid. In dealing with the matter the Supreme Court says that the interest acquired by the inheritor "was not a contingent right to income as it should accrue . . . . it was a vested life estate in a fund changing in investment at the discretion of the trustee but retaining its equitable identity. . . . . The statute does not invite speculation in a new nomenclature or attempt to reach profounder conceptions than those familiar to the law. When it speaks of interest absolute invested in possession we presume that it uses familiar legal expressions in their familiar legal sense. It deals in terms with the interest, that is, the legal unit of right, not with the money received before a given moment. No better example of such an interest could be given than a life estate in a fund, the enjoyment of which actually has begun. . . . ." This appears to run counter to the views expressed in those decisions where the court has held that an annuity which was not invested in specific funds but was simply payable year by year by specified persons or agencies as, e.g., by a life insurance company, was taxable only as it was paid. It was largely on the strength of that view that the lower courts, including the Court of Claims and comprising in all about twelve or thirteen federal judges, decided in favor of the claimants in this case. The reversal of the findings of the lower courts by the Supreme Court in this decision not only establishes an important precedent but saves the government about $2,500,000 which it would otherwise have had to disburse to claimants of inheritance tax refunds who would promptly have filed claims had this decision gone in favor of the taxpayers.